81-2294

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re Grand Jury Proceeding
Involving
MATTHEW MADONNA,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Is the conduct of a grand jury investigation solely for intelligence gathering purposes and to make the witness into a government informant to aid that purpose an abuse of the grand jury process?

2. Was the witness' refusal to testify, even under a grant of immunity, justified where the grand jury was utilized as a contempt trap solely to increase the term of imprisonment the witness is already serving?

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MATTHEW MADONNA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Matthew Madonna, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 20, 1982.

Opinions Below

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed an order of civil contempt, pursuant to 28 U.S.C. §1826(a), entered by the United States District Court for the Southern District of New York by the Honorable David N. Edelstein, United States District Judge, against petitioner on March 17, 1982. Madonna was confined until such time as he complied with the court order to testify, or for the term of the grand jury, or until August 25, 1983. At the time of the contempt citation, Madonna was serving a sentence of thirty years' impris-

onment for violation of the federal narcotics laws. The running of that sentence was stayed during his confinement for civil contempt.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for writ of certiorari is filed within 60 days of the entry of the Court of Appeals judgment of affirmance.

Questions Presented

1. Is the conduct of a grand jury investigation solely for intelligence gathering purposes and to make the witness into a government informant to aid that purpose an abuse of the grand jury process?

2. Was the witness' refusal to testify, even under a grant of immunity, justified where the grand jury was utilized as a contempt trap solely to increase the term of imprisonment the witness is already serving?

Statutory Provisions Involved

18 U.S.C. §6001, *et seq.*; 28 U.S.C. §1826(a). These provisions appear in Appendix B to this petition.

Statement of Facts

In 1954, Matthew Madonna was convicted of murder and sentenced to twenty years to natural life imprisonment. He served fourteen years in state prison for the commission of that offense.

In 1976, Madonna was convicted in the United States District Court for the Southern District of New York of two counts of violating the federal narcotics laws after a trial before the Honorable Robert L. Carter and a jury. Specifically, he was convicted of conspiring to distribute, possess with intent to distribute, and to import heroin, in violation of Title 21 United States Code, Sections 812, 841(a)(1), 841(b)(1)(a) and 952(a), and of the substantive offense of distribution and possession with intent to distribute heroin in violation of Title 21 United States Code, Sections 812, 841(a)(1), and 841(b)(1)(a). Madonna was sentenced to two consecutive terms of fifteen years' imprisonment and fined $50,000. Madonna has been incarcerated on that judgment of conviction since December 21, 1976.

On January 21, 1982, as Madonna began the sixth year of his thirty year sentence, he was summoned to testify before the January, 1982 Additional Grand Jury which was sitting in the Southern District of New York. After identifying himself, Madonna inquired about the scope of the grand jury's investigation and thereafter invoked his privilege against self-incrimination in refusing to answer any further questions. (Tr. 6)*

On February 17, 1982, the government applied for an order, pursuant to Title 18 United States Code, Section 6001, *et seq.*, immunizing Madonna and compelling him to testify before the grand jury. The application was supported by an affidavit of government counsel and was made with the approval of the Assistant Attorney General of the United States. The application recited the fact that Madonna had refused to testify on the basis of his privi-

* Numbers in parentheses preceded by the letters "Tr." refer to the transcript of the sealed contempt proceeding before the District Court.

lege against self-incrimination and that, in the judgment of the United States Attorney for the Southern District of New York, the testimony may be necessary to the public interest. (A. 4)* On the same date, the District Court issued the immunity order which compelled Madonna to testify as to all matters about which he may be interrogated before the grand jury. (A. 7)

> Q. I will read back to you, you asked the same question the last time you were before the grand jury and I answered it, and I am now going to read back the precise answer that I gave you on that prior occasion. "The Drug Enforcement Administration and my office are in possession of certain facts concerning your past activities in the narcotics field. We are also in possession of certain facts that indicate certain relationships or associations that you have had with other people. The general purpose of this inquiry is to see if we can't ascertain from you any information that might have that would add"—this is the literal thing—"that might have that would add to the substance of the intelligence that we are in possession of with respect to those two areas."

(Tr. 7-8).

Although Madonna had been incarcerated for 6 years, he was then asked when he had last been employed and his source of income. He was also asked whether he knew Robert Stepany, Mario Perna, Ralph Tutino, Leroy Barnes, Herbert Sperling, Steven Baker, Armand Cassario, Thomas Mancuso, Salvatore Larca and Joseph Boriello. (Tr. 8-12) Madonna declined to answer each

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*Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix submitted to the Second Circuit Court of Appeals.

specific question posed to him, as well as a catch-all question as to whether he would answer any question posed to him. (Tr. 12)

The prosecutor conducting the grand jury then conferred immunity upon Madonna by giving him a copy of the order. After consulting with counsel, Madonna returned to the grand jury and informed the prosecutor that whether he would respond to particular questions posed to him would depend on the question asked. (Tr. 13-14) However, as to the questions he had already been asked, he would continue to invoke his privilege against self-incrimination. (Tr. 17)

Shortly thereafter, the parties appeared before the District Court where the transcript of the day's grand jury proceedings was read into the record. Madonna raised several objections to demonstrate "just cause" for failing to comply with the court's order that he testify under a grant of immunity. 28 U.S.C. §1826(a). Madonna challenged the grand jury process as improper, claiming the grand jury had been convened solely for intelligence gathering purposes and that the questioning of him was being attempted in order to make him an informant in aid of that function. Furthermore, Madonna argued that the grand jury was being misused as a contempt trap to increase his already lengthy sentence of incarceration. Madonna also objected to testifying because of his belief the grand jury was being used as a tool for discovery in his post-conviction proceeding to vacate his sentence since he had been asked about Larca and Boriello, his former co-defendants in *United States* v. *Madonna*, 76 Cr. 846 (R.L.C.).

The government attempted to justify its insistence that Madonna testify before the grand jury as follows:

> The government's purpose here is a legitimate one. Being aware of Mr. Madonna's background, being aware of the type of activity he has been involved in over the years, being aware of the number of people that he has associated with and with whom he has been convicted, it occurs to me that I might reasonably say to myself, your Honor, this man is doing 30 years in jail. Maybe he wants to do something about it. That's why he was called before the grand jury.
>
> • • •
>
> The reason we brought him before the grand jury, I have just stated it to the court. This man has knowledge. This man has intelligence about past things and present things and the government says we will give you an opportunity, if you wish, to tell us about it.

(Tr. 26-27).

Before instructing the witness to answer, the District Court stated that Madonna's contention he had been brought before the grand jury "purely for investigative questioning" was "unsupported" and "conclusory." (Tr. 28) The Court therefore ordered him to go back to the grand jury and respond to questions. However, counsel for Madonna intervened and informed the Court that Madonna would adhere to his refusal to answer the questions which had been posed to him. (Tr. 30). The Court then granted the government's motion that Madonna be found in civil contempt, pursuant to 28 U.S.C. §1826(a), confined him until he testified or for the life of the grand jury, and stayed the running of Madonna's thirty-year prison sentence until that time.

The order of civil contempt dated March 17, 1982, formed the basis of an expedited appeal to the United States Court of Appeals for the Second Circuit. (A. 21-22) The

Second Circuit affirmed the order of civil contempt by judgment dated April 20, 1982.

Reasons for Allowance of the Writ

Point One

The Conduct of a Grand Jury Investigation Solely for Intelligence Gathering Purposes and to Make the Witness Into a Government Informant to Aid That Purpose Is an Abuse of the Grand Jury Process.

The only legitimate function of a grand jury is to determine whether or not probable cause exists to believe that a crime has been committed, and, if so, to file charges against such persons as are reasonably believed to have committed it. *Branzburg* v. *Hayes*, 408 U.S. 665, 686-87 (1972). *See also United States* v. *Calandra*, 414 U.S. 338, 343-44 (1974). Therefore the appropriate activity of a grand jury consists of two parts; the inquiry into the existence of possible criminal conduct and the concomitant protection of the citizen from unfounded indictment. *Branzberg, supra*, at 688.

In order to carry out its function, the grand jury has broad investigative power. It can compel production of such testimony and evidence it deems to be relevant, "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Costello* v. *United States*, 350 U.S. 359, 362 (1956). However, there are matters into which a grand jury may not inquire simply because they fall outside the area of its proper functions. Clearly, for example, a grand jury may not be impaneled nor its process used for the sole purpose of preparing an already pending indictment for trial. *United States* v.

Dardi, 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). It has also been recognized that the grand jury process may not be used by a federal prosecutor solely to conduct his own investigation. *Durbin* v. *United States*, 221 F.2d 520, 522 (D.C.Cir. 1954). Moreover, a court will refuse to enforce a subpoena if the grand jury is not pursuing a good faith investigation or is motivated by a desire to harass. *United States* v. *Dionisio*, 410 U.S. 1 (1972); *Branzburg* v. *Hayes*, 408 U.S. 665, 707-08 (1972).

This limiting function of the federal courts may be exercised by means of the courts' supervisory powers over the grand jury process. Mr. Justice Rehnquist stated the general rule in *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973):

> Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.

See also McNabb v. *United States*, 318 U.S. 332, 240 (1943).

In this case, Matthew Madonna has been brought before a grand jury which has as its stated purpose the gaining of intelligence about his past relationships and activities. (Tr. 8) The government's only reason for calling Madonna was to see if he wanted "to do something" about the thirty-year sentence he is serving by cooperating with the government in its intelligence gathering. (Tr. 27) Under the circumstances in this case, this constitutes an abuse of the grand jury process and, therefore, Madonna had just cause to refuse to testify before the grand jury.

The District Court found Madonna's allegation that his presence before the grand jury was for purely investiga-

tive questioning to be "unsupported" and "entirely conclusory." (Tr. 28) However, the District Court was incorrect, because it was the government itself which had so described the scope of the grand jury's investigation. The prosecutor stated that:

> "The Drug Enforcement Administration and my office are in possession of certain facts concerning your past activities in the narcotics field. We are also in possession of certain facts that indicate certain relationships or associations that you have had with other people. The general purpose of this inquiry is to see if we can't ascertain from you any information that might have that would add"—this is the literal thing—"that might have that would add to the substance of the intelligence that we are in possession of with respect to those two areas.

(Tr. 7-8). It is, therefore, clear that the grand jury was seeking to add intelligence to the intelligence it already had and to do so by asking Madonna about activities and relationships over six years in the past.

Moreover, when the government sought to justify the use of grand jury process herein, it stated its purpose as follows:

> Being aware of Mr. Madonna's background, being aware of the type of activity he has been involved in over the years, being aware of the number of people that he has associated with and with whom he has been convicted, it occurs to me that I might reasonably say to myself, your Honor, this man is doing 30 years in jail. Maybe he wants to do something about it. That's why he was called before the grand jury.

(Tr. 27-8). It is, therefore, apparent that the purpose of the grand jury process was to make Madonna an informant to aid the grand jury in an intelligence gathering activity.

However, it is the Federal Bureau of Investigation and not a grand jury which has as its appropriate function the gathering of such background information. It is not proper for the process of the grand jury to be used to make Madonna the handmaiden of the F.B.I. Since Congress has not given the F.B.I. subpoena power or the ability to enforce such power with contempt, this Court should not allow this grand jury to become an arm of the F.B.I. and do indirectly what that agency cannot do directly. *See In re Stolar*, 397 F.Supp. 520 (S.D.N.Y. 1975).

The government cannot have had any reasonable expectation that Madonna would become an informant to aid it in gathering intelligence information. The government is aware that Madonna served fourteen years of a twenty to life sentence for murder without ever offering to exchange information for leniency with the state authorities. Indeed, the government also knows that Madonna has already served approximately five and a half years of his thirty year sentence on a federal narcotics conviction. Yet he has never contacted the federal authorities to become an informant on their behalf. Common sense dictates that if Madonna had been so inclined, he could have found his way to the prosecutor's office or to the F.B.I.

Accordingly, the grand jury process which is being used to make Madonna into an informant in aid of an intelligence gathering function is an abuse of the grand jury. Madonna thus had just cause to refuse to testify before the grand jury, and he should not have been held in contempt.

Point Two

The Grand Jury Was Conducted as a Contempt Trap to Increase the Term of Imprisonment the Witness Is Already Serving and, Therefore, the Witness' Refusal to Testify, Even Under a Grant of Immunity, Was Justified.

The function of the federal grand jury is to determine whether to indict persons suspected of committing serious crimes. United States Constitution, Amend 5. The grand jury has investigatory power of broad scope to seek information bearing on the decision to indict.

> Because its task is to inquire into the existence of possible criminal conduct and return only well-founded indictments, its investigative powers are necessarily broad.

Branzburg v. *Hayes*, 408 U.S. 664, 668 (1972). However, use of the grand jury for purposes outside its legitimate investigative authority is an abuse of process. *See, e.g., United States* v. *Fisher*, 455 F.2d 1101, 1105 (2d Cir. 1972).

In this case, the government's real purpose in requiring Madonna's appearance before the grand jury was to cite him for contempt. It is apparent from the scope of the investigation of the grand jury as stated by the prosecutor that the grand jury is seeking merely to add information to the intelligence it already has about Madonna's activities and relationships in the period before his incarceration, almost six years ago. In addition, the government's sole justification for calling Madonna as a witness was to see if he would become an informant of such intelligence. Knowing the lengthy periods of incarceration Madonna had already served, the government could have

no legitimate expectation that he would supply any information to it. These circumstances make it apparent that the calling of Madonna before the grand jury after conferring immunity on him was a transparent effort to use his expected refusal to testify as a basis for holding him in contempt. This was an illegitimate use of the grand jury.

An analogous situation has arisen in the area of the so-called perjury trap. In *Brown* v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957), a witness appeared before a grand jury called, sworn and sitting in the District of Nebraska, but the false statements he made had to do with matters which occurred in the Eastern District of Missouri. The Court of Appeals reversed the defendant's conviction and ordered the indictment dismissed because the compelling of testimony with a view to prosecuting the witness for perjury without any purpose of obtaining any evidence upon which it could indict anyone for a crime is not a competent activity for a grand jury. The Court had found that the evidence

> clearly established that [the prosecutor's] purpose was simply to do what he did, viz., to extract from the defendant his testimony about the talk in which he had taken part in St. Louis on May 3, 1959, knowing that his recollection of it differed from that of the others present, and to get him indicted for perjury. He knew how each of the parties to that talk, including defendant, remembered it because each had made his sworn statement to investigator Strain, and three of the parties to the talk had already given their recollection of it to the grand jury before [the prosecutor] called defendant. Extracting testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The

> purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt.

Brown v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957).

To like effect is the holding of the District Court of Colorado in *United States* v. *Thayer*, 214 F.Supp. 929 (D. Colo. 1963). In that case, the defendant had given testimony before an investigative proceeding of the Securities and Exchange Commission which differed from that of other witnesses. The defendant was summoned again before the SEC, gave the same testimony, and was indicted for perjury. The court ordered a hearing to inquire into the government's purpose in summoning the defendant to give the testimony which led to the indictment, stating:

> If it should appear that the government was substantially certain prior to the April 19th hearing that the defendant would give false answers, it would then follow that the testimony so induced should not be received in evidence.

The court held:

> An indictment charging an offense which is entirely the work product of the government cannot be upheld.

Id.

Similarly, in *United States* v. *Icardi*, 140 F.Supp. 383 (D.D.C. 1956), the defendant was called before a congressional subcommittee investigating the circumstances surrounding the disappearance and death of Maj. William V. Hollahan. Icardi appeared before the subcommittee and, before he testified, was warned by the chairman that anything he said might be used against him in a future proceeding. The subcommittee counsel also informed Icardi that the subcommittee was in possession of the transcripts

of his prior statements in connection with the matter. Despite the warning, Icardi answered questions and reiterated his prior statements concerning the disappearance of Major Hollahan.

The District Court stated that Icardi could have done one of three things when he testified. He could have confessed, asserted his privilege against self-incrimination, or repeated his denial of guilt as he had in his previous statements. Since the subcommittee had sufficient information upon which to make its report, the calling of Icardi to testify under such circumstances was improper. The Court wrote:

> It is unnecessary for the court to determine for which purpose Icardi's testimony was sought or obtained, since neither affording an individual a forum in which to protest his innocence nor extracting testimony with a view to a perjury prosecution is a valid legislative purpose.
>
> • • •
>
> On the basis of all the evidence before it, the court therefore finds, as a matter of law, that at the time the subcommittee questioned the defendant Icardi, it was not functioning as a competent tribunal.

140 F.Supp. at 388.

Because the subcommittee was working outside its proper function, the Court held the defendant's testimony did not relate to a material matter and thus failed to satisfy an element of the offense of perjury.

Under the same reasoning, since the government here knew that Madonna would not testify and also knew there was no legitimate grand jury investigation, the requiring of Madonna's testimony was for no other purpose than

to create a basis for his being held in contempt. The sanction of civil contempt has the sole punitive effect of increasing Madonna's term of imprisonment imposed in his narcotics case.

Since the government's purpose in calling Madonna before the grand jury was to have him held in contempt, there has been an abuse of the grand jury process.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

82-6060

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twentieth day of April, one thousand nine hundred and eighty-two.

Present:

HONORABLE STERRY R. WATERMAN,
HONORABLE LEONARD P. MOORE,
HONORABLE THOMAS J. MESKILL,

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

In re Grand Jury Proceeding Involving

MATTHEW MADONNA,

Appellant.

This is an appeal from an order of civil contempt pursuant to 28 U.S.C. § 1826(a) entered by the United States

Appendix A

District Court for the Southern District of New York, Edelstein, *J.*, on March 17, 1982. The order provides that appellant is to be confined until he is willing to testify before the grand jury or until the expiration of its term or until August 25, 1982, whichever occurs first. Madonna has been serving consecutive fifteen year sentences for violating the narcotics laws, the running of which sentences had been suspended during his term of incarceration for civil contempt.

This appeal was argued by counsel who claims that (1) the conduct of a grand jury investigation solely for intelligence gathering purposes and to make the witness into a government informant to aid that purpose is an abuse of the grand jury process, and (2) the grand jury was conducted as a contempt trap to increase the term of imprisonment the witness is already serving and, therefore, the witness' refusal to testify, even under a grant of immunity, was justified.

A recalcitrant witness has no standing to take exception to the jurisdiction of the grand jury over the particular subject matter that is under investigation. *In re Yaasmyn D. Fula*, slip op. 1323, 1329 (2d Cir. Feb. 17, 1982). "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it." *Branzburg* v. *Hayes*, 408 U.S. 665, 701 (1972); *United States* v. *Calandra*, 414 U.S. 338, 342-44 (1974). The grand jury in this case was apparently convened to investigate the relationship among major drug figures, some of whom had been previously convicted. Madonna presents no basis for impeaching the use of the grand jury for this function.

Appendix A

Madonna's claim that it was improper to call him as a witness is likewise without merit. *Matter of Archuleta*, 561 F.2d 1059, 1061 (2d Cir. 1977). Madonna was convicted of possession and distribution of heroin and conspiring with others to possess and distribute heroin. He was called before the grand jury and asked about major drug figures in the New York area. As the Supreme Court stated in *Blair* v. *United States*, 250 U.S. at 282, a witness before a grand jury is:

> bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.
>
> He is not entitled to urge objections of incompetency or irrelevancy, such as a party may raise for this is no concern of his.

Madonna attempts to justify his refusal to testify on the ground that he should never have been called as a witness. However, the government is not required to make a preliminary showing that a witness will provide vital information before he may be required to appear before a grand jury. *United States* v. *Doe*, 457 F.2d 895, 899 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973). Since the case law precludes a witness' challenge to need or relevancy prior to appearing before a grand jury, it necessarily follows that a recalcitrant witness cannot argue these same points after refusing to testify as "just cause" for his refusal.

Madonna's claim that the grand jury was conducted as a contempt trap to increase his term of imprisonment is likewise without merit. There is no basis for concluding that the government knew that Madonna would not testify.

Appendix A

Further, Madonna does not indicate why after he had spent six years in jail, the government would go through this elaborate process merely to hold him in contempt and thereby stay his thirty-year sentence for eighteen months.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is affirmed.

/s/ Sterry R. Waterman,
Sterry R. Waterman, U.S.C.J.

/s/ Leonard P. Moore
Leonard P. Moore, U.S.C.J.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

Appendix B

Statutes Involved

Immunity of Witnesses

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankruptcy court established under chapter 6, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of privilege against self-incrimination, to testify or provide other information in a proceeding before an ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in

any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States

refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

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No. 81-2294

In the Supreme Court of the United States

OCTOBER TERM, 1982

MATTHEW MADONNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that he was justified in refusing to testify before a grand jury despite a court order immunizing him and compelling him to testify, pursuant to 18 U.S.C. 6001 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1982. The petition for a writ of certiorari was filed on June 14, 1982 (backdated to May 20, 1982). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In 1976, after a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to import, distribute and possess heroin, in violation of 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A) and 952(a), and of distribution of the drug and possession of it with intent to distribute, in violation of 21

U.S.C. 812, 841(a)(1) and 841(b)(1)(A). Petitioner was sentenced to 15 years' imprisonment and a $25,000 fine on each count. The sentences of imprisonment were to run consecutively, for a total term of 30 years, to be followed by a special parole term of three years. The convictions were upheld on appeal. *United States* v. *Madonna*, 556 F. 2d 562 (2d Cir.), cert. denied, 434 U.S. 919 (1977).

2. On January 21, 1982, while petitioner was imprisoned in connection with his criminal conviction, he was summoned to testify before a federal grand jury sitting in the Southern District of New York. The grand jury was convened to investigate the relationship among major drug figures (Pet. App. 2a). After responding to a request that he identify himself, petitioner inquired about the purpose of the grand jury investigation. The prosecutor explained the purpose of the investigation and the nature of the information that would be sought from petitioner. Petitioner then invoked his privilege against self-incrimination and refused to answer questions. The government thereafter applied for an order immunizing petitioner and compelling him to testify before the grand jury, pursuant to 18 U.S.C. 6001 *et seq.*, which was issued by the district court on February 17, 1982 (Tr. 2-3).[1]

On March 16, 1982, petitioner again appeared before the grand jury. He again invoked his privilege against self-incrimination and refused to answer questions about his employment and source of income and whether he knew certain individuals (Tr. 3-12). The prosecutor then conferred immunity upon petitioner by giving him a copy of the order previously issued by the district court (Tr. 12-13).

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[1] "Tr." refers to the sealed transcript of the contempt proceeding before the district court, dated March 16, 1982.

After consulting with counsel, petitioner returned to the grand jury room and confirmed that he would persist in refusing to answer questions (Tr. 13-17).

Later that day the parties appeared before the district court, and the transcript of the day's grand jury proceedings was read into the record. Counsel for petitioner raised a number of claims, including those advanced before this Court, in an effort to demonstrate "just cause" for petitioner's failure to comply with the court's order.[2] The district court heard argument on these claims and concluded that petitioner's contentions concerning the grand jury proceeding were "unsupported [and] entirely conclusory" (Tr. 28). After ascertaining that petitioner intended to persist in his refusal to testify before the grand jury, the district court found petitioner in civil contempt and ordered that he be confined until he complied with the order, or for the life of the grand jury, but not longer than 18 months. The district court also stayed the running of petitioner's sentence on his criminal conviction for the period during which he remained in civil contempt (Tr. 28-30).

The court of appeals upheld the district court's adjudication of civil contempt (Pet. App. 1a-4a). It noted that a recalcitrant witness has no standing to take exception to the jurisdiction of the grand jury over the particular subject matter under investigation; that petitioner had presented no basis for impeaching use of the grand jury to investigate the relationship among major drug figures; and that the government is not required to make a preliminary showing that a witness will provide vital information before he is required to appear before a grand jury (*id.* at 2a-3a). The court of appeals rejected as unsupported and unrealistic

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[2]See 28 U.S.C. 1826(a).

petitioner's claim that the grand jury was being used as a "contempt trap" to increase his term of imprisonment (*id.* at 3a-4a).

ARGUMENT

Both the district court and the court of appeals rejected the claims raised by petitioner. The decisions of the courts below are clearly correct, and no further review by this Court is warranted.

1. Petitioner first contends (Pet. 7-10) that the grand jury was being used solely as an intelligence-gathering tool for the Federal Bureau of Investigation. Petitioner cites in support of this contention the prosecutor's statement that the grand jury's investigation encompassed petitioner's past activities in the narcotics field and relationships with others, that the Drug Enforcement Administration and the United States Attorney's office had some information on those subjects, and that the general purpose of the grand jury's inquiry was to gain additional intelligence about those subjects (Tr. 7-8).[3]

Petitioner's contention is without merit. Of course, the traditional role of the grand jury is in part investigatory. See *United States* v. *Calandra*, 414 U.S. 338, 344 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 700-702 (1972); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). As the court of appeals noted (Pet. App. 2a), a recalcitrant witness has no standing to take exception to the grand jury's jurisdiction over the matter under investigation. See, *e.g.*, *In re Fula*, 672 F. 2d 279, 283 (2d Cir. 1982). See also *Blair* v. *United States*, 250 U.S. 273, 282 (1919) (grand jury witness not entitled to urge objections of incompetency or irrelevancy).

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[3]Petitioner stresses the prosecutor's use of the word "intelligence." It is clear from the context that the prosecutor used that term as synonymous with "knowledge" or "information."

Nor is the government required to make a preliminary showing that its request for appearance of a particular witness is reasonable. See *United States* v. *Doe*, 457 F. 2d 895, 898 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973).

Moreover, there is no ground for petitioner's contention that the grand jury was not seeking information that might lead to an indictment but rather was being used as an "arm of the FBI." Petitioner apparently interprets the prosecutor's statement concerning the scope of the investigation to mean that the grand jury had called him with the sole purpose of adding to FBI intelligence files and not with any purpose of gathering information that would assist the grand jury in determining whether criminal conduct had occurred (Pet. 10).[4] This is an implausible interpretation, which the district court correctly found to be "unsupported" and "entirely conclusory" (Tr. 28). The court of appeals concluded that the grand jury had been convened "to investigate the relationship among major drug figures, some of whom had been previously convicted" and that petitioner had no basis for impeaching use of the grand jury for this function (Pet. App. 2a). It is clear that the grand jury

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[4]Petitioner seeks to analogize this case to *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975). In *Stolar* the court found an abuse of the grand jury process in the subpoena of an attorney to appear before a grand jury in order to compel him to disclose the address and telephone number of his client. The court concluded that the information apparently was not needed for the grand jury investigation, but was requested solely so that it could be turned over to the FBI. In the present case, unlike *Stolar*, there is no indication that the FBI is in any way involved in the decision to call petitioner before the grand jury or that any information developed by the grand jury will ever be transmitted to the FBI or to any other federal agency. Moreover, given petitioner's past involvement in the narcotics business, there is every reason to believe that his answers to the questions posed would yield information that could result in indictments by the grand jury. The *Stolar* case, which has been limited to its own particular facts (*e.g.*, *In re Gruberg*, 453 F. Supp. 1225, 1233 (S.D.N.Y. 1978)), clearly has no application here.

was properly investigating aspects of the narcotics business and that petitioner's background made it reasonable to expect that he might provide information leading to one or more indictments. See *United States* v. *Mandujano*, 425 U.S. 564, 573 (1976) (Burger, C.J.). As both courts below found, there is no basis whatsoever for petitioner's assertion that the grand jury was being used improperly.

2. Petitioner also argues that the other "real" purpose of requiring his testimony was to force him into contempt and thereby lengthen his term of imprisonment (Pet. 11-15).[5] In support of this theory, petitioner simply asserts that because he had not, during his past years of imprisonment, sought voluntarily to provide information to the FBI, the prosecutor must have known that he would never give such information (Pet. 10, 11-12). This allegation is wholly unsupported. Nothing in the record indicates that the government believed that petitioner would refuse to testify when ordered to do so by a court or that its motivation in calling him to testify was to add to the length of his term of imprisonment.[6] The court of appeals perceived "no basis"

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[5]There is nothing improper in the district court's decision to suspend the running of the sentence for petitioner's criminal conviction during the time of his confinement for contempt. See, *e.g.*, *United States* v. *Wilson*, 421 U.S. 309, 321 n.2 (1975) (Blackmun, J., concurring); *United States* v. *Dien*, 598 F. 2d 743, 744 (2d Cir. 1979); *id.* at 745 n.1 (citing decisions of seven other circuit courts supporting a federal court's power to stay a prior federal criminal sentence pending confinement for contempt). Of course, if the confinement for contempt were to run concurrently with petitioner's sentence, he would have no incentive to purge himself of the contempt by agreeing to testify. See *United States* v. *Dien*, *supra*, 598 F. 2d at 744.

[6]Petitioner faults the prosecutor for explaining (Pet. 9, quoting Tr. 26-27):

> Being aware of [petitioner's] background, being aware of the type of activity he has been involved in over the years, being aware of the number of people that he has associated with and with whom he has been convicted, it occurs to me that I might reasonably say

for petitioner's allegation and found it inexplicable that, after petitioner had spent six years in prison, the government would suddenly initiate the complicated grand jury process merely to add 18 months to petitioner's 30-year sentence (*id.* at 3a-4a). The court of appeals correctly rejected petitioner's claim.[7]

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to myself, your Honor, this man is doing 30 years in jail. Maybe he wants to do something about it. That's why he was called before the grand jury.

The clear import of those words is that the prosecutor hoped that petitioner would respond to the grand jury's questions with helpful information.

[7]The cases cited by petitioner in support of his argument are inapposite. In *United States* v. *Fisher*, 455 F. 2d 1101, 1105 (2d Cir. 1972), the court criticized the government's use of the grand jury to "freeze" the testimony of a potential witness. No such use is even alleged here. The other cases cited by petitioner involve perjury prosecutions in which the government apparently had requested a witness's testimony solely for the purpose of causing the witness to contradict or perjure himself. See *Brown* v. *United States*, 245 F. 2d 549, 555 (8th Cir. 1957); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo. 1963); *United States* v. *Icardi*, 140 F. Supp. 383 (D.D.C. 1956). Again, in this case no such use of the grand jury is alleged, much less proved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

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